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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter of )  
Southwestern Bell Telephone )  
Company's Comparably Efficient )  
Interconnection Plan for the )  
Provision of Security Service )  
\_\_\_\_\_

CC Docket Nos. 85-229, 90-623 and 95-20

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To: The Common Carrier Bureau

**MOTION TO HOLD IN ABEYANCE**

The Alarm Industry Communications Committee ("AICC"), by its attorneys, hereby moves the Federal Communications Commission's ("Commission") Common Carrier Bureau ("Bureau") to hold in abeyance its consideration of the above-captioned Southwestern Bell Telephone Company ("SWB") CEI Plan until completion of the rulemaking proceeding initiated in CC Docket No. 96-152.<sup>1</sup> For the reasons described below, grant of this Motion to Hold in Abeyance is necessary to avoid unlawful prejudgment of a rulemaking proceeding and to ensure the orderly conduct of Commission processes.

<sup>1</sup> *Telemessaging, Electronic Publishing and Alarm Monitoring Services*, CC Docket No. 96-152, *Notice of Proposed Rulemaking*, FCC 96-310 (rel. July 18, 1996) ("NPRM").

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## INTRODUCTION

On April 4, 1996, SWBT filed a CEI Plan seeking FCC approval for entry into the alarm monitoring business.<sup>2</sup> On May 24, 1996, AICC and Ameritech filed comments opposing SWBT's CEI Plan. In their oppositions, both AICC and Ameritech asserted that Bureau approval must be denied because it would tacitly authorize SWBT to violate Section 275(a)(1)<sup>4</sup> of the Telecommunications Act of 1996 ("1996 Act" or "Act").<sup>5</sup> SWBT filed reply comments<sup>6</sup> and the matter now remains pending before the Bureau.

On July 19, 1996, the Commission issued its *NPRM* concerning, among other things, the alarm monitoring service provisions of the 1996 Act.<sup>7</sup> Included among the issues for consideration in that docket are the "types of activities [that] constitute the 'provision' of

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<sup>2</sup> *Pleading Cycle Established for Comments on SWBT's CEI Plan for Security Service*, CC Docket Nos. 85-229, 90-623 and 95-20, *Public Notice*, DA 96-645 (rel. Apr. 26, 1996).

<sup>3</sup> *Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for Security Service*, CC Docket Nos. 85-229, 90-623 and 95-20, *Comments of the Alarm Industry Communications Committee*, filed May 24, 1996 ("*AICC Comments*"); *Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for Security Service*, CC Docket Nos. 85-229, 90-623 and 95-20, *Comments of Ameritech Corporation*, filed May 24, 1996 ("*Ameritech Comments*").

<sup>4</sup> 47 U.S.C. § 275(a)(1).

<sup>5</sup> *AICC Comments* at 1; *Ameritech Comments* at 1.

<sup>6</sup> *Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for Security Service*, CC Docket Nos. 85-229, 90-623 and 95-20, *Reply Comments of the Southwestern Bell Telephone Company*, filed June 7, 1996 ("*SWBT Reply Comments*").

<sup>7</sup> *Telemessaging, Electronic Publishing and Alarm Monitoring Services*, CC Docket No. 96-152, *Notice of Proposed Rulemaking*, FCC 96-310 (rel. July 18, 1996) ("*NPRM*").

alarm monitoring services subject to the 1996 Act."<sup>8</sup> Specifically, the Commission seeks comment on

whether, among other things, billing and collection, sales agency, marketing, and/or various compensation arrangements, either individually or collectively, would constitute the provision of alarm monitoring.<sup>9</sup>

In this *NPRM*, the Commission also seeks comment on "any other factors that may be relevant in determining whether an incumbent LEC, including a BOC, is providing an alarm monitoring service subject to the 1996 Act."<sup>10</sup> The *NPRM* expressly acknowledges that "questions concerning the provision of alarm monitoring services have arisen in connection with" SWBT's CEI Plan.<sup>11</sup> Comments and Reply Comments are due on September 4, 1996 and September 20, 1996, respectively.

**I. Action on the SWBT CEI Plan In Advance of Completion of CC Docket No. 96-152 Unlawfully Will Prejudge the Rulemaking**

Grant of this Motion to Hold in Abeyance consideration of SWBT's CEI Plan is necessary because the Commission's determination of issues raised in the *NPRM* will be decisive of the controversy over that plan. Thus, a decision on SWBT's CEI Plan prior to the conclusion of the Commission's alarm monitoring rulemaking would be premature.

Specifically, the controversy over SWBT's CEI Plan turns on what constitutes the "provision of alarm monitoring services" that SWBT and all BOCs other than Ameritech are

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<sup>8</sup> *NPRM* at ¶ 71.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at n. 113.

prohibited from engaging in for five years from the 1996 Act's date of enactment.<sup>12</sup> In the *NPRM*, the Commission sets out to determine the meaning of "provision of alarm monitoring services" and to establish rules or guidelines necessary to ensure that any interpretation of Section 275, such as that which is required with respect to SWBT's CEI Plan, is consistent with Congress' mandate.

As noted above, in the *VPRM*, the Commission seeks comments as to what components of the provision of alarm monitoring service, taken individually, together or in light of additional relevant factors, constitute the "provision of alarm monitoring service" addressed in Section 275.<sup>13</sup> Obviously, the Bureau must make the same consideration before arriving at a decision in the SWBT matter. In short, the *NPRM* seeks to establish a generic rule delineating the factors which constitute the provision of alarm monitoring service, and the SWBT controversy requires a specific application of that rule. Accordingly, any attempt to resolve the latter before the former would be nonsensical.

In addition to being premature and nonsensical, Bureau action on SWBT's CEI Plan in advance of the conclusion of the alarm monitoring rulemaking would implicitly decide issues raised in the *NPRM*. Such action would result in prejudgment of the issues and, consequently, would moot the purpose of notice and comment rulemaking in contravention of the Administrative Procedure Act ("APA").<sup>14</sup> As the Court of Appeals for the District of Columbia Circuit has noted, the purpose of notice and comment rulemaking is "to allow the

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<sup>12</sup> 47 U.S.C. § 275(a)(1).

<sup>13</sup> *NPRM* at ¶ 73; 47 U.S.C. § 275.

<sup>14</sup> 5 U.S.C. § 553.

agency to benefit from the experience and input of the parties who file comments . . . and to see to it that the agency maintains a flexible and open-minded attitude toward its own rules."<sup>15</sup> This purpose cannot be realized if issues that the Commission sets out for comment are prejudged. The Commission is no stranger to this conclusion. On many occasions, it has declined consideration of a particular matter because of general consideration, in a pending rulemaking, of rules or policies that may affect that matter.<sup>16</sup> To conclude otherwise would compromise the integrity of the Commission's processes.

Moreover, if the Commission were to approve SWBT's CEI Plan without addressing the Section 275 issue<sup>17</sup> and prior to the conclusion of notice and comment rulemaking on that issue, its action could be construed as a tacit finding of the lawfulness of SWBT's provision of alarm monitoring services. At the very least, authorization of a plan that includes the provision of services that later could be found to be unlawful is bad public policy.

## **II. Action on SWBT's CEI Plan Before Completion of the Alarm Monitoring Rulemaking Would Be Administratively Burdensome**

As stated above, approval of SWBT's CEI Plan requires a determination of the plan's consistency with Section 275 of the 1996 Act.<sup>18</sup> Since the *NPRM* seeks to establish a generic rule or policy delineating the factors which constitute the "provision of alarm

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<sup>15</sup> *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

<sup>16</sup> See, e.g., *Los Angeles Pierce College*, CC Docket No. 83-1376, *Memorandum and Opinion Order*, FCC 76-1061 (rel. Dec. 2, 1976).

<sup>17</sup> SWBT proposes that this is exactly what the Commission should do. *SWBT Reply Comments* at 1.

<sup>18</sup> 47 U.S.C. § 275.

monitoring service" and, subsequently, compliance with Section 275, any dedication of scarce Commission resources to reviewing the plan for such compliance prior to the conclusion of that rulemaking would be administratively unjustifiable.

Moreover, the Commission's report and order in the alarm monitoring rulemaking is likely to make explicitly clear that SWBT's proposed provision of "Security Service" is in plain violation of the 1996 Act. In that case, any resources dedicated to reviewing the lawfulness of SWBT's plan prior to the conclusion of the alarm monitoring rulemaking would be wasted. At a time when Commission resources already are stretched by the tremendous responsibility for implementing the 1996 Act given to it by Congress, it is unfortunate that *any* resources must be dedicated to assessing the lawfulness of bald-faced attempts to skirt the Act's provisions and undermine the intent of Congress. However, since our system of government makes this necessary, the Commission should ensure that it is done in the most efficient way possible.

### **III. Bureau Action on SWBT's CEI Plan Before Completion of the Alarm Monitoring Rulemaking Would Be Ultra Vires**

Subject to certain exceptions and limitations, Section 0.291 of the Commission's rules delegates authority to the Chief of the Common Carrier Bureau ("Bureau") to act on and approve items such as CEI plans.<sup>19</sup> Among the limitations on delegated authority is that which is contained in Section 0.291(a)(2).<sup>20</sup> Section 0.291(a)(2) provides that:

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<sup>19</sup> 47 C.F.R. § 0.291.

<sup>20</sup> *Id.* at § 0.291(a)(2)

The Chief, Common Carrier *Bureau shall not have authority to act* on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.<sup>21</sup>

As the controversy surrounding SWBT's CEI Plan and paragraph 73 of the *NPRM* indicate, the determination of what constitutes the "provision of alarm monitoring services" addressed in Section 275 constitutes a novel question of law. Thus, because consideration of SWBT's CEI Plan necessarily involves a decision on this novel question of law, the Bureau is not empowered to act on SWBT's CEI Plan until the Commission addresses it in the alarm monitoring rulemaking.

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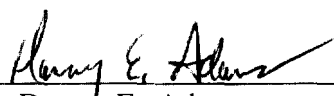
<sup>21</sup> *Id.* (emphasis added)

## CONCLUSION

For the foregoing reasons, the Bureau should grant this Motion to Hold in Abeyance its consideration of SWBT's DEI Plan until the Commission's rulemaking established in CC Docket No. 96-152 is completed.

Respectfully submitted,

**ALARM INDUSTRY  
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August 2, 1996



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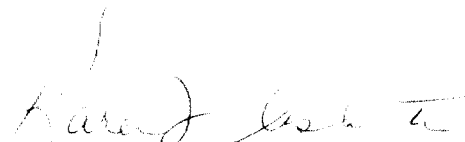
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